

The State of New Hampshire

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opinion

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August 13, 1974

The Honorable Robert W. Flanders
Treasurer of the State of New Hampshire
State House Annex
Concord, New Hampshire 03301

Dear Mr. Flanders:

By your letter dated June 4, 1974 you have asked our advice in a matter involving the administration of funds from the national government for financing sewage and waste treatment facilities. When such facilities are constructed by municipalities in this State, the municipality normally borrows the construction cost. While the national government contributes toward such costs ("the national share" hereinafter), thus reducing the need to borrow, in times of fiscal tightness in the past the national share has not been forthcoming prior to construction, thus increasing the extent of required municipal borrowing. In 1969 the Legislature enacted 1969 Laws 376 providing that the State could "prefinance" the share which the national government would normally pay. This legislation assumed the municipality would borrow the amount of the normal national share, and it provided that in addition to its powers under other statutes the State could commit itself to pay up to fifty percent of the amortization charges on the total municipal borrowing (i.e., to pay up to the usual national share plus the proportionate cost of borrowing). Thus, to prefinance was actually to promise to pay back money borrowed by the municipality plus interest. The same session law appropriated funds for the purpose of prefinancing, and authorized the Treasurer to issue bonds and notes to raise these funds to amortize the debts of the municipalities. 1969 Laws 376:3 and 4; see also 1971 Laws 557:67.

The 1971 Legislature added to the 1969 session law with a new section entitled "Reimbursements of Grants to State," providing that when the delayed funds from the national government were paid to the municipality which had received prefinancing, the municipality should "draw a check payable to the state of New Hampshire in the amount of

The Honorable Robert W. Flanders
August 13, 1974
Page Two

the federal grant, or in the amount of the prefinancing grant if less." 1971 Laws 220:2. Some such reimbursements were made, and in a report to the Fiscal Committee dated August 22, 1972, the Office of the Legislative Budget Assistant recommended that "legislation be enacted for the disposition of these receipts." The result was 1973 Laws 308, whose section 1 added this provision to the 1969 session law:

"The state treasurer shall deposit in a special fund all reimbursements made by municipalities to the New Hampshire water supply and control commission pursuant to section 2-a, and disburse said funds to liquidate any bonded indebtedness incurred to the purposes of prefinancing the pollution control projects under the provisions of this chapter."

You now set out the situation in which the State has pre-financed the national share of a municipality's cost, and has made some actual payments to amortize a portion of the municipality's borrowing in the amount of that national share. At this point the national government pays to the municipality a part of the national share, and the amount of that part exceeds the amount the State has theretofore paid under the prefinancing arrangement. Under 1971 Laws 220:2 the municipality must pay to the State "the amount of the federal grant, or . . . the amount of the prefinancing grant if less." You ask whether "the amount of the prefinancing grant" is (1) the amount actually paid out by the State in amortization payments prior to the time the national share is actually paid over to the municipality or (2) the amount of the total state commitment to amortize over the life of the municipal borrowing (i.e., the greatest amount the State could pay under the prefinancing arrangement if the national share were never paid). Our opinion is that the latter view is the correct one, so that the municipality must reimburse the State not merely for the amount the State has already paid out but for its total commitment to pay.

In reaching this conclusion we have been confronted with a series of statutes which speak with little clarity on the issue involved. The statutes nowhere define the term "prefinancing grants." Moreover, they are capable of bearing either the "actual payment" interpretation or the "total commitment" interpretation. We have examined the references in Senate and House Journals to all of the bills

The Honorable Robert W. Flanders
August 13, 1974
Page Three

which eventuated in the session laws we have cited, but the Journals contain nothing helpful on point. We have examined a good deal of material extraneous to technical legislative history. Ultimately, we must base our conclusion on past administrative practice and on what constitutes a sensible administrative result.

Those who maintain that "the amount of the prefinancing grant" means the amount actually paid out by the State may make at least two plausible arguments based on the statutes. The first argument focuses on the word "Reimbursement" in the title to section 2 of the 1971 Laws 220, "Reimbursement of Grants to the State." In common usage "reimburse" is equivalent to "pay back." Webster's Third International Dictionary. One would speak of paying back only what had been paid out, rather than what merely had been promised. See RSA 21:2. The second argument concerns 1973 Laws 308:1, which is quoted in full above, and proceeds as follows. It would be sensible to construe the word "prefinancing" in that statute to be consistent with the word "prefinanced" in 1971 Laws 220:2; hence, prefinancing would be deemed to refer to action by the State, not a town. The special fund created under 1973 Laws 308:1 was to consist solely of town reimbursements required by 1971 Laws 220:2, and the apparent ultimate purpose of the fund was to liquidate bonded indebtedness "incurred" for the object of prefinancing. One could argue thereupon that the fund, and therefore town reimbursements, need be no larger than the amount of indebtedness already "incurred" by the State. That amount, of course, could be considerably less than the amount of the State's commitment to prefinance. Yet the argument has a weakness: it assumes the amount of bonded indebtedness incurred by the State will equal the amount of payments made to towns. Those amounts, however, need not always be equivalent. One could, nevertheless, further argue along the following lines. There is no suggestion in 1973 Laws 308:1 that the Treasurer may do anything else with the reimbursement but retire the State bonds used to raise money to amortize the national share of the municipal obligation. Yet if the "prefinancing grant" in 1971 Laws 220:2 meant the entire amount the State committed itself to pay, beyond what it had in fact paid, the result would be that the Treasurer would be required to hold the reimbursement in a fund that could not be used directly to amortize the appropriate municipal obligations. That would be so because the Treasurer could disburse the funds in question only to liquidate State indebtedness. To use the reimbursed funds as they were intended to be used, the Treasurer would have to borrow money by selling bonds, which he could then retire by drawing on the special reimbursement fund. Even assuming interest rates and bonding costs would be such that these would be wash transactions, they would still have the effect of depleting the State appropriations available for prefinancing purposes. One could

The Honorable Robert W. Flanders
August 13, 1974
Page Four

then conclude such an argument by asserting that such transactions would be cumbersome and useless and that, therefore, they were not likely intended by the Legislature.

Though the statutes admit of the constructions set out in the preceding paragraph, they do not compel those constructions. To the "reimbursement" argument, one could respond that the statutory title refers to reimbursements "of Grants," not "of Payments." We are informed by Mr. Metcalf, who served as Director of Municipal Services of the Water Supply and Pollution Control Commission until July of 1974, that the Commission has always regarded the word "grants" to mean the total commitment of the State to prefinance, not merely the amount actually paid out in prefinancing. Consistent with that interpretation is information provided us by Mr. Healy, Executive Director of the Commission, that in most cases in which a town has reimbursed the State with federal monies received, the amount of such monies has exceeded the amount the State has already paid under its prefinancing arrangement. We are informed that some of the towns that made such reimbursements are Newport, Peterborough, and Durham. In response to the second argument set out in the preceding paragraph, concerning 1973 Laws 308:1, one could assert that the word "incurred" is ambiguous: it may mean not only "already" incurred but also "to be" incurred. Further, one could assert, more broadly, that 1973 Laws 308:1 does not require a result that would leave the prefinancing program inefficient and illogical. Yet such a result would obtain, unless the State had maximum control over the national share. Concerning that control, it is important to recognize that usually the national share has been released in a number of part payments rather than in one complete payment. If the State were not entitled to the full amount of each part payment, the prefinancing payments would be subject to administratively disruptive stops and starts, and the State could not have maximum use of federally dispensed funds to extinguish bonded indebtedness already incurred by the State for purposes of prefinancing. As to the stops and starts, if (1) an initial part payment exceeded the amount the State had already paid under a prefinancing arrangement, (2) prefinancing payments therefore stopped, and (3) that excess were kept by the affected town but proved insufficient to cover the town for debts coming due between the initial part payment and the second part payment: then the town would have to look once more to the State for payments under the prefinancing arrangement. As to the State's not having maximum use of federally dispensed funds, if (1) again an initial part payment by the federal government exceeded the amount the State had already paid under a prefinancing arrangement,

The Honorable Robert W. Flanders
August 13, 1974
Page Five

(2) again prefinancing payments therefore stopped, (3) again the town kept that excess, and (4) the State had already incurred bonded indebtedness that exceeded the payments actually made to the town: then the State would have no federally dispensed funds to extinguish the difference between the indebtedness it had incurred and the payments it had made. Such results could not have been intended by the Legislature. The entire prefinancing process would be far more efficient and logical if the State's payments to a town simply continued without interruption, regardless of the amount of any part payment of the national share. With that continuation, moreover, the State, not the town, would need the federal monies being dispensed to the town.

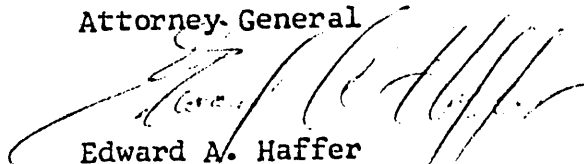
Unless the prefinancing commitment is less than the federal grant (see 1971 Laws 220:2), we find nothing in the statutes before us requiring us to conclude that the State cannot have the full amount of each part payment of the national share. Absent such a statutory command, we believe that the need for sensible administration of prefinancing requires the conclusion that, whenever the prefinancing commitment is not less than the federal grant, the State must acquire the full amount of each part payment of the national share.

You have also asked whether the excess of town reimbursements over payments already made to towns may be invested, and, if so, whether the interest on such an investment should be applied to the special fund created under 1973 Laws 308:1 or to the general fund. We find nothing in the statutes that prohibits such an investment. In the absence of such a prohibition, we think that prudence in fiscal management indicates discreet investment. As to the use of the interest from such an investment, the statutes are silent. As a result, we think that the usual administrative practice should apply, so that the interest would go into the general fund. Had the Legislature intended the interest to go into the special fund, we think it would have expressed such an intent in law, just as it did, for example, in RSA 284:21-j (supp), which requires the placement in a special fund of interest received on monies of the Sweepstakes Commission. By concluding that the interest goes into the general fund, we leave to the Legislature the decision on any specific future use for the interest.

Sincerely,



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Attorney General



Edward A. Haffer
Assistant Attorney General